

decision.<sup>78</sup> Accordingly, we support Time Warner and Cablevision's argument that the Commission must affirm the *I.D.* because the preponderance of the record evidence establishes that Liberty does not possess the qualifications to be a Commission licensee.<sup>79</sup>

The Bureau also agrees with Time Warner and Cablevision that Liberty demonstrated lack of candor both during the process of disclosing its violations to the Commission, *and* in the instant hearing, for example, by making false statements in support of its license applications and by delaying production of highly relevant documents in this proceeding.<sup>80</sup> The Bureau believes the Presiding Judge's assessment of Liberty witnesses' credibility and demeanor was proper and that Liberty lacked candor. Furthermore, we emphasize, as did Time Warner and Cablevision, that "Commission precedent requires that credibility findings of an ALJ be given decisional deference, unless those findings are in irreconcilable conflict with the record evidence"<sup>81</sup>

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<sup>78</sup> Joint Brief at 6.

<sup>79</sup> *See id.* at 5.

<sup>80</sup> *See generally id.* at 7-20.

<sup>81</sup> *Id.* at 6 (citing *RKO General, Inc.*, 4 FCC Rcd 4679 (Rev. Bd. 1989)). *See also* *Director, OWCP v. Jaffe N.Y. Decorating*, 25 F.3d 1080, 1087 (D.C. Cir. 1994) ("Determining witness credibility is indisputably within the realm of the ALJ's unique authority."); *Avondale Indus., Inc. v. Director, OWCP*, 977 F.2d 186, 189 (5th Cir. 1992) ("As a fact finder, the ALJ determines questions of credibility of witnesses and of conflicting evidence."); *Communist Party of U.S. v. Subversive Activities Control Bd.*, 277 F.2d 78, 82 (D.C. Cir. 1959), *aff'd*, 367 U.S. 1 (1961) ("The credibility of witnesses must be left largely to the trier of the facts; this is the rule as to both trial courts and administrative agencies.").

#### IV. ULTIMATE CONCLUSION

Based on the total weight of the record evidence, the Bureau believes it is in the public interest to support the conclusions properly reached by the Presiding Judge in the *I.D.* that Liberty should be denied the Joint Motion for Summary Decision as well as the captioned pending microwave applications.

The Bureau does note that the Commission's final decision affirming the *I.D.* could impact upon the state of competition in the delivery of video programming services in New York, and could result in temporary interruption of service to those who are currently served by Liberty.<sup>82</sup> While a negative impact on competition is a valid concern, on balance, the Bureau believes that in the instant matter, there is a compelling public interest in maintaining the integrity of the Commission's Rules by taking strong enforcement measures where, as here, such measures are appropriate.<sup>83</sup>

The Bureau also recognizes that the Commission is concerned with disruption of service to the public.<sup>84</sup> Therefore, the Bureau believes that the Commission, in its final decision affirming the *I.D.*, should consider all available measures for the continuation of video service to the affected public.

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<sup>82</sup> As a result of a transfer of some of its assets in March 1996, Liberty claims that it no longer provides video services directly to its subscribers. Rather, Liberty, through a contract with RCN, provides only the video transmitting service from its program headends using its Commission licenses, and RCN, in turn, operates the microwave paths to the approximately 30,000 video subscribers who were once Liberty's direct customers.


<sup>83</sup> The Bureau also notes that Commission's recent actions in authorizing LMDS, MMDS, DBS, and other alternatives to cable should enhance competition in the delivery of video services to markets such as New York City.

<sup>84</sup> See, e.g., *H.D.O.* ¶¶ 21-27.


For the foregoing reasons, the Chief, Wireless Telecommunications Bureau, believes that Liberty's Exceptions to Initial Decision should be denied and the *I.D.* be affirmed.

Respectfully Submitted,

Daniel Phythyon  
Chief, Wireless Telecommunications Bureau



Gary P. Schonman  
Chief, Compliance and Litigation Branch



Katherine C. Power  
Mark L. Keam  
Attorneys

Federal Communications Commission  
2025 M Street, N.W., Suite 8308  
Washington, D.C. 20554  
(202) 418-0569

April 22, 1998

**CERTIFICATE OF SERVICE**

I, Mark L. Keam, of the Wireless Telecommunications Bureau, certify that I have, on this 22nd day of April, 1998, caused to be served by hand delivery, facsimile, or regular United States mail, copies of the foregoing "**WIRELESS TELECOMMUNICATIONS BUREAU'S CONSOLIDATED REPLY**" to:

Magalie Roman Salas  
Secretary, Federal Communications Commission  
1919 M Street, N.W., Suite 222  
Washington, D.C. 20554  
(by hand delivery)

The Honorable Richard L. Sippel  
Administrative Law Judge  
2000 L Street, N.W., Suite 220  
Washington, D.C. 20554  
(by hand delivery)

Robert L. Begleiter, Esq.  
Constantine & Partners  
909 Third Avenue, Tenth Floor  
New York, NY 10022

Robert L. Pettit, Esq.  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

R. Bruce Beckner, Esq.  
Fleishman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W., Suite 600  
Washington, D.C. 20036

Christopher A. Holt, Esq.  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.  
701 Pennsylvania Avenue, N.W., Suite 900  
Washington, D.C. 20004

April 22, 1998

  
Mark L. Keam